

FILED

UNITED STATES COURT OF APPEALS

MAY 16 2012

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

BRENDAN MCKOWN, a single
individual,

Plaintiff - Appellant,

v.

SIMON PROPERTY GROUP INC, a
Delaware corporation doing business as
Tacoma Mall and IPC INTERNATIONAL
CORPORATION, an Illinois corporation,

Defendants - Appellees.

No. 11-35461

D.C. No. 3:08-cv-05754-BHS
Western District of Washington,
Tacoma

ORDER

Before: GOULD, BYBEE, and BEA, Circuit Judges.

The panel is considering certifying the following questions to the Washington Supreme Court. We invite the parties to submit comments on the form of these proposed questions and to propose additional questions if the parties wish.

1. Does Washington adopt Restatement (Second) of Torts § 344 (1965), including comments d and f, as binding law? *See Nivens v. 7-11 Hoagy's Corner*, 943 P.2d 286 (Wash. 1997).

2. To create a genuine issue of material fact as to the foreseeability of the harm resulting from a third party's criminal act when the defendant did not know

of the dangerous propensities of the individual responsible for the criminal act, must a plaintiff show previous acts of similar violence on the premises? *See Wilbert v. Metro. Park Dist. of Tacoma*, 950 P.2d 522 (Wash. Ct. App. 1998); *see also Fuentes v. Port of Seattle*, 82 P.3d 1175 (Wash. Ct. App. 2004); *Craig v. Washington Trust Bank*, 976 P.2d 126 (Wash. Ct. App. 1999); *Raider v. Greyhound Lines, Inc.*, 975 P.2d 518 (Wash. Ct. App. 1999); *cf. Nivens*, 943 P.2d 286 (Wash. 1997); *Christen v. Lee*, 780 P.2d 1307 (Wash. 1989).

3. If so, what are the characteristics which determine whether the previous acts are indeed similar?

The responses shall not exceed 10 pages and shall be submitted simultaneously, no later than 21 days after the entry of this order. Parties who are registered for ECF must file the supplemental brief electronically. Parties who are not registered ECF filers must file the original supplemental brief plus seven paper copies.